(5)

No. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE ESTATE OF FLOYD COWART

Petitioner,

VERSUS

NICKLOS DRILLING COMPANY, AND
COMPASS INSURANCE COMPANY

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR THE PETITIONER FLOYD COWART

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38

QUESTION PRESENTED FOR REVIEW

Whether a compromise by a claimant with a third party tortfeasor, without the express written approval of his employer/carrier, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer/carrier knew of the compromise, and irrespective of whether the employer/carrier was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

LIST OF PARTIES

The following are entities interested in the outcome of this case.

1. Compass Insurance Company
   (Carrier)
2. Nicklos Drilling Company
   (Employer)
3. Floyd Cowart
   (Claimant)
4. Director, Office of Workers' Compensation Programs, United States Department of Labor
5. Mr. H. Lee Lewis, Jr.,
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TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	8
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
Rule 13.1 of the Supreme Court Rules	1
28 U.S.C. 1254(1)	1
28 U.S.C. 2101(c)	1
33 U.S.C. 933(f)	12
33 U.S.C. 933(g)	2,13,14,18,19,20
44 Stat. 1441	13
73 Stat. 392	13
1959 Legislative History	10,11
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	18
Anweiler v. Avondale Shipyards, Inc., 21 BRBS 271 (1988)	17
Armand v. American Marine Corporation, 21 BRBS 305 (1988)	17
Banks v. Chicago Grain Trimmers Association, 390 U.S. 459, 88 S.Ct. 1140 (1968)	13
Bell v. O'Hearne, 284 F.2d 777 (4th Cir. 1960)	13
Bethlehem Steel Corp. v. Mobley, 20 BRBS 239 (1988), *aff'd.* 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990)	17,29
Blake v. Bethlehem Steel Corporation, 21 BRBS 49 (1988)	17
Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982) (en banc)	25
Caranante v. International Terminal Operating Company, Inc., 7 BRBS 248 (1977)	16
Castorina v. Lykes Brothers Steamship Company, Inc., 21 BRBS 136 (1988)	17
Cernousek v. Braswell Shipyards, Inc., 19 BRBS 796 (ALJ, 1987)	17

Table of Authorities Continued

	Page
Chapman v. Hoage, 296 U.S. 526, 56 S.Ct. 333 (1936)	13
Chemical Manufacturers Association v. NRDC, 470 U.S. 116 (1985)	25
Colautti v. Franklin, 439 U.S. 379 (1977)	22
Cowart v. Nicklos Drilling Company, 19 BRBS 457 (ALJ, 1986);*aff'd.* 23 BRBS 42 (1989); *rvs'd.* 907 F.2d 1552(5th Cir. 1990); *aff'd.* 927 F.2d 828 (5th Cir. 1991)(en banc)	1,3,26,27
Cretan v. Bethlehem Steel Corporation, 24 BRBS 35 (1990)	17
Cunningham v. Kaiser Steel Corporation, 21 BRBS 154 (ALJ, 1988)	17
Dorsey v. Cooper Stevedoring Company, Inc., 18 BRBS 25 (1986)	17,23
Evans v. Horne Brothers, Inc., 20 BRBS 226 (1988)	17
Fisher v. Todd Shipyards Corporation, 21 BRBS 323 (1988)	17
Glenn v. Todd Pacific Shipyards Corp., 22 BRBS 254 (ALJ, 1989)	17
Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), *aff'd. mem.* 729 F.2d 757 (5th Cir. 1984) (unpublished)	17,18
Lewis v. Norfolk Shipbuilding and Dry Dock Corporation, 20 BRBS 126 (1987)	17
Lindsay v. Bethlehem Steel Corporation, 18 BRBS 20 (1986), *aff'd.* 22 BRBS 206 (1989)	17
Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866 (1978)	18
NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951)	18
Nesmith v. Farrell American Station, 19 BRBS 176 (1986)	17

Table of Authorities Continued

	Page
Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977)	8,11
O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988)	17
O'Leary v. Southeast Stevedore Company, 5 BRBS 161 (ALJ, 1976), *aff'd.* 7 BRBS 144 (1977), *aff'd. mem.* 622 F.2d 596 (9th Cir. 1980) (unpublished)	15,16
Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986)	8,27,28
Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989)	17
Pinell v. Patterson Service, 22 BRBS 61 (1989)	24
Quinn v. Washington Metropolitan Area Transit Authority, 20 BRBS 65 (1986)	17
Reaux v. H & H Welders & Fabricating, 24 BRBS 7 (ALJ, 1990)	17
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	19
Robinson Terminal Warehouse Corporation v. Adler, 440 F.2d 1060 (4th Cir. 1971)	23
Sellman v. I.T.O. Corporation of Baltimore, 24 BRBS 11 (1990)	17
Todd v. J & M Welding Contractors, 16 BRBS 434 (ALJ, 1984)	17
U.S. v. Menasche, 348 U.S. 528 (1955)	19,22
Voris v. Eikel, 346 U.S. 328 (1953)	8,11
Wall v. Wall, 15 BRBS 197 (ALJ, 1982)	17
Wilson v. Triple A Machine Ship, 17 BRBS 471 (ALJ, 1985)	17,18,22

OPINIONS AND JUDGMENTS BELOW

The Decision and Order of Administrative Law Judge Parlen L. McKenna in this matter was rendered on November 25, 1986, and is published at 19 BRBS 457.

The Opinion of the Benefits Review Board was rendered on October 31, 1989, and is published at 23 BRBS 42.

The Judgment of the United States Court of Appeals for the Fifth Circuit was rendered on August 9, 1990, and is published at 907 F.2d 1552.

The Decision of The United States Court of Appeals for the Fifth Circuit to allow rehearing en banc was issued on November 6, 1990.

The Judgment of the United States Court of Appeals for the Fifth Circuit, en banc, was rendered on March 29, 1991, and is published at 927 F.2d 828.

The Decision of the United States Supreme Court to accept Writs of Certiorari, was issued on December 9, 1991.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, en banc, was rendered on March 29, 1991. The Petition for Writ of Certiorari was filed within 90 days of March 29, 1991, as required by 28 U.S.C. 2101(c) and Rule 13.1 of the United State Supreme Court Rules. Jurisdiction of this Court is proper under the provisions of 28 U.S.C. 1254(1).

STATUTE INVOLVED

The statute involved in this matter is Sections 933(g)(1) and 933(g)(2) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et. seq.*, which reads in its entirety:

> (g) Compromise obtained by person entitled to compensation.
>
> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

STATEMENT OF THE CASE

(i) Disposition below

This case arises out of a claim by Floyd Cowart for compensation benefits pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, *et. seq.* Cowart sustained an injury in the course and scope of his employment with Nicklos Drilling Company.

The matter was heard before Administrative Law Judge, Parlen L. McKenna, who entered an order on November 25, 1986, awarding Cowart benefits. 19 BRBS 457; J.A. 4. Nicklos Drilling Company appealed to the Benefits Review Board. On October 31, 1989, the Board affirmed Judge McKenna's award. 23 BRBS 42; J.A. 3.

On August 9, 1990, a three judge panel of the United States Court of Appeals for the Fifth Circuit reversed the findings of Judge McKenna as affirmed by the Board. J.A. 2. Cowart timely petitioned the Fifth Circuit for a Rehearing En Banc, which was granted on November 6, 1990. On March 31, 1991, the Fifth Circuit, ruling en banc, affirmed the panel's decision. J.A. 1. Cowart applied to this Court for certiorari, which was granted on December 9, 1991.

(ii) Statement of Facts

On July 20, 1983, Floyd Cowart suffered a crush injury to his hand during movement of a mud tank by a crane. At the time of his injury, Cowart was

working for Nicklos Drilling Company on Rig 81, a Transco Exploration Company platform located on the outer continental shelf. In addition to the crush injury, Cowart also lost the distal half of his thumb. After several months of treatment, Cowart reached maximum medical improvement on May 21, 1984. On May 25, 1984, Cowart's physician released him to return to work, assessing a forty percent partial disability rating, based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Immediately after his injury, Cowart made a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.* Cowart received temporary total disability benefits from July 21, 1983, the date of his accident, through May 21, 1984, the date he reached maximum medical improvement. As Cowart had sustained a schedule injury under Section 8(c)(6) of the Act, he was automatically entitled to two thirds of his average weekly wage for a seventy-five week period, commencing on the date of maximum medical improvement; May 21, 1984. While Nicklos, who acknowledged liability for these schedule benefits, was instructed by the Department of Labor to pay said benefits; Nicklos never paid these benefits to Cowart.

Meanwhile, Cowart had filed suit in the United States District Court for the Eastern District of Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, more than thirteen months after the schedule payments were supposed to have begun, but before any such payments were made by Nicklos, Cowart settled his third party claim with Transco. This settlement was funded entirely by Nicklos pursuant

to an indemnification agreement between Nicklos and Transco. Thus, Nicklos not only had notice of the settlement between Cowart and Transco, but actually paid the settlement funds to Cowart.

Cowart's compensation claim under the Act proceeded to administrative hearing on November 25, 1986. Nicklos argued that Cowart forfeited his claim for compensation because Cowart failed to obtain Nicklos' *written* approval of the settlement, pursuant to Section 933(g) of the Act. Administrative Law Judge Parlen L. McKenna held that Section 933(g) did not preclude compensation benefits under the fact situation at bar; Nicklos' participation in the settlement agreement sufficed as notice under Section 933(g)(2) irrespective of the fact that Cowart had not garnered Nicklos' *written* approval. J.A. 4.

The Benefits Review Board affirmed McKenna's decision and the matter was appealed to the United States Court of Appeals for the Fifth Circuit. On August 9, 1990, a three judge panel reversed the Administrative Law Judge and the Benefits Review Board, holding:

> ". . . there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier. . ."
>
> J.A. 2, p. 38.

As this holding conflicted with prior precedent of the Fifth Circuit, Cowart filed a Suggestion for Rehearing En Banc which was granted on November 6, 1990. Sitting en banc, the Fifth Circuit affirmed the panel's

decision on March 31, 1991. J.A. 1. This Court granted certiorari on December 9, 1991.

SUMMARY OF ARGUMENT

The issue at bar is one of statutory interpretation, specifically, the interpretation of Section 933(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.* Section 933(g) enunciates the requisite notice to be given an employer any time a claimant under the Act confects a settlement with a third party.

Section 933(g), in its current form, provides for an alternative notice requirement depending on the employer's compliance with the Act. 933(g)(1) provides that a "person entitled to compensation" must garner the employer's *written* approval for any third party settlement. 933(g)(2) requires that all "employees" must give the employer *notice* of any third party settlement. The United States Court of Appeals for the Fifth Circuit has ruled that Section 933(g)(1) and Section 933(g)(2) operate redundantly, i.e., the notice required under both Sections is the same, written approval.

Historically, the application of the *written* approval requirement of Section 933(g)(1) has turned on the definition of the term "person entitled to compensation". The Administrative and Judicial tribunals have consistently interpreted this term to mean that *written* approval under Section 933(g)(1) is required only under those circumstances where the claimant either (1) was receiving compensation benefits from the employer at the time of the settlement, or (2) had been judicially determined to be entitled to compensation. By thus interpreting Section 933(g)(1), the

Administrative and Judicial tribunals struck an equitable balance, ensuring that both the overall intent of the Act (encouraging employers to promptly pay injured workers the compensation benefits due them), and the overall intent of Section 933(g) (allaying employer's fears that injured workers whom they paid benefits might anonymously settle their third party claims without allowing the employer to protect their liens), were satisfied.

In 1984, Congress enacted Section 933(g)(2). This Section requires all claimants, irrespective of whether they meet the definition of "person entitled to compensation", to give notice to the employer of any third party settlements. However, Congress, in an effort to protect the claimant from the potential abuse of Section 933(g)(2) (employers withholding compensation *and* written approval in hopes of ultimately not being forced to pay any benefits whatsoever) limited the requirements of 933(g)(2) to requiring *notice*, rather than *written approval*.

The strict interpretation of the words used in Section 933(g)(2) evidence this attempt by Congress to limit the notice requirements. Conversely, the Fifth Circuit's interpretation of 933(g)(2), is both linguistically, and historically, insupportable.

In the captioned matter, the United States Court of Appeals for the Fifth Circuit, disregarded the historical interpretation of Section 933(g)(1), disregarded the natural interpretation of the verbiage in Section 933(g)(2), and circumvented the clear intent of Congress. Instead, the Fifth Circuit unilaterally ruled that all claimants, irrespective of whether or not they were "persons entitled to compensation", were required by Section 933(g) to obtain *written approval* of any third

party settlements. By so ruling, the Fifth Circuit has unwittingly destroyed the equitable balance historically maintained between employees and employers.

ARGUMENT

The Longshore and Harbor Workers' Compensation Act, 933 U.S.C. 901, *et. seq.* was enacted in 1927 to compensate injured longshore and harbor workers for injuries suffered in the course and scope of their employment. Congress intended, and the Supreme Court has held, that the Act should be construed in order to further its purpose of compensating longshore and harbor workers, "and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 268 (1977).

In keeping with this legislative intent, Section 933(g) of the Act provides that the employer be notified prior to any settlement between an injured worker and a third party. As the Fifth Circuit succinctly pointed out in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986), the legislative intent behind Section 933(g) was twofold, namely:

1). To protect the employer's right to directly recover its compensation liability from the third party tortfeasor; and

2). To protect the employer's statutory right to a set-off against its compensation liability for any amount received by the employee from the third party tortfeasor.

Collier, supra at 646.

This intent, enunciated by the *Collier* court, is

clearly in keeping within the overall intent of the Act as set forth in *Voris, supra* and *Northeast Marine, supra*. The Act was meant as social legislation, to compensate longshore and harbor workers for their injuries. Section 933(g) was enacted to encourage employers to pay their compensation liability, by preserving those employer's right to recover such payments from a third party tortfeasor. By requiring notification of any third party settlement, Section 933(g) ensures employers that settlement will not be confected without their approval, thereby alleviating the employers' fear that they will not be recompensed for compensation benefits paid by themselves, but ultimately deemed owed by a third party.

The question that arises is whether Section 933(g) was intended to provide *equal* protection, both to those employers who *are* fulfilling the intent of the Act by paying the claimant compensation benefits; and those employers who *are not* fulfilling the intent of the Act by withholding such compensation benefits. By protecting those employers who *are* paying the claimant compensation benefits, Section 933(g) encourages employers to fulfill their obligation under the Act. Interpreting Section 933(g) to provide *equal* protection to those employers who are *not* paying such compensation benefits circumvents Congress' intent to encourage employers to promptly compensate longshore and harbor workers; rather encouraging employers to withhold compensation benefits until such time as they are judicially ordered to pay such benefits. In any case in which the possibility of a third party settlement arose, the employer could withhold compensation benefits, and withhold written approval of a settlement agreement, in hopes of ultimately

avoiding the payment of any compensation whatsoever. There would be no means to protect a claimant against such withholding. Such an interpretation is clearly contrary to the intent of the Act.

An alternative interpretation, is to read Section 933(g) as providing different levels of protection for the two classes of employers. Under this interpretation, Section 933(g) would be interpreted as requiring *written approval* from an employer who was *paying* compensation; and only *notification* to an employer who was *not paying* compensation. Such an interpretation would reinforce the underlying intent of Section 933(g), encouraging employers to promptly pay compensation benefits by affording said employers greater protection; while conversely mitigating the potential abuse of Section 933(g), by affording lesser protection to those employers who are not paying compensation benefits.

The precise issue before this Court is whether a compromise by a claimant with a third party tortfeasor, without the express written approval of his employer, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer knew of the compromise, and irrespective of whether the employer was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

History of 933(g):

Any case involving statutory interpretation necessarily begins with a discussion of the history of the statute. As noted earlier, the Act was promulgated as social legislation, to be construed in order to further its purpose of compensating longshore and harbor workers, "and in a way which avoids harsh and incongruous results. *Voris, supra*; *Northeast Terminal, supra*. Section 933 of the Act, as originally enacted, reserved to these workers, and to their employer, the right to recover damages from third parties causing injury.

In 1959, Section 933 was amended, because of a problem that faced workers attempting to take advantage of the third-party actions reserved them. As noted in the legislative history.

> . . . in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third party suit. He may not pursue both courses.
>
> Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. . .
>
> J.A. 7, p. 121.

To correct this problem, Congress amended Section 933 so as to permit an employee to bring a third-party tort suit without forfeiting his right to compensation under the Act. In so doing, Congress evidenced its intent to ensure that the injured worker

was not forced to choose between compensation benefits and tort recovery. Rather, Congress intended that the worker continue to receive the compensation benefits guaranteed under the Act, and be allowed to proceed in tort. More importantly, Congress intended that the choice of how to proceed, if any, should be left to the injured worker.

At the time of the 1959 amendments, claimants under the Act were able to pursue a variety of third-party tort actions against a large number of potential defendant's, including the claimant's employer. Consequently, claimant's third party actions usually settled for a much larger amount. As claimants were more likely to receive third party settlements which exceeded the amount to which they would be entitled to under the Act, further compensation was often barred under Section 933(f).[1] Thus, in the more usual cases, the claimant had no incentive to press his compensation claim against the employer because the claimant was not entitled to any more benefits. Thus, the problem leading to Congress' amendment in 1959 (the inequity of making an injured worker choose his remedy) was resolved by that amendment's reserving the worker's right to sue in tort *while* receiving compensation.

Now that the general intent of Section 933 has been demonstrated, the question arises as to what part Section 933(g) plays in the legislative scheme. From 1927 until 1972, Section 933(g) read substantially as follows:

[1] Section 933(f) provides that the employer is only liable to the extent that the compensation benefits due the injured worker exceed any amount that the injured worker recovers from a third party.

> "(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval."
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> 44 Stat. 1441; 73 Stat. 392.

There is a dearth of cases construing Section 933(g) during this period.[2] This paucity of litigation involving Section 933(g) prior to 1972 (as opposed to the large number of cases construing Section 933(g) after 1972) is not unusual given the extensive changes wrought by the 1972 amendments to the Act.

The 1972 amendments limited the available actions in tort for persons covered by the Act in exchange for increasing compensation benefits. The 1972 amendments changed Section 933(g) to provide in pertinent part:

[2] The leading cases are *Chapman v. Hoage*, 296 U.S. 526, 56 S.Ct. 333 (1936) (Section 933(g) does not bar a claim for compensation unless the carrier is actually prejudiced by the claimant's failure to prosecute his third party action); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 88 S.Ct. 1140 (1968) (claimant's consent to a court ordered remittitur is not a compromise within the meaning of 933(g) because the employer's interest was protected by the trial court in ordering the remittitur); and *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960) (after claimant's third party action was tried to judgment, settling for a lesser amount was not a compromise as long as the employer was credited for the full amount, because the employer's interest was fully protected).

(g) Compromise obtained by person entitled to compensation.

If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be liable for compensation determined in subsection (f) of this section *only if written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise* on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

33 U.S.C. 933(g).

The above underlined portion of the 1972 amendment raised an interesting question concerning the problems eradicated by the 1959 amendments. By requiring the injured worker to obtain the employer's written approval of any compromise with a third party, the potential arose for employer's to abuse the Act, and circumvent the intent of the 1959 amendments. If the 1972 amendment was read strictly, the employer could withhold approval of any settlement offer, even if the employer was not paying compensation to the injured worker. The injured worker, facing mounting expenses (and consequently unable to outlast the administrative delays required to garner compensation from the employer) could be effectively

forced to forego such compensation, and accept a settlement offer that would meet his current expenses.

This opening for potential abuse by employers was shut by the administrative and judicial tribunals who have, since 1972, interpreted Section 933(g), with the same result.

The Judicial History:

The issue was first faced by the administrative law judge in *O'Leary v. Southeast Stevedore Company*, 5 BRBS 16 (1976). In *O'Leary* the administrative law judge noted that Section 933(g) "presuppose[s] that compensation is not only payable under the Act, but that both claimant and respondent accept that compensation is payable." *Id.* at 24. The decision continued:

> "Only when the decision of the Benefits Review Board and the Order of Judge Bernstein pursuant to that Decision were not appealed, was Claimant's status as such a person assured. Until that time she did not know and Respondent's did not know if she was a person entitled to compensation."

Id. at 25.

Thus, the *O'Leary* judge held:

> "Entitled to compensation means presently recognized as entitled to compensation; it does not mean one who, after arduous years of litigation may finally be declared to be entitled to compensation. The permission of the employer and its carrier to settle a third party action must be obtained only where compensation benefits are acknowledged. Congress did not intend that per-

> mission to settle a third party action must be obtained from a Respondent who (although with apparently valid reason) denies any responsibility to make compensation benefits."
>
> *Id.*

In upholding the administrative law judge's determination, the Benefits Review Board noted that a different interpretation:

> "could result in a claimant not being paid compensation, yet the claimant would be afraid to make a third party settlement for in doing so he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . ."
>
> 7 BRBS 144, 149 (1977).

By so reasoning, the *O'Leary* Board closed the door to the potential abuse of the Act by employers. The Board reasoned that "the very language [of Section 933(g)] contemplat[es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." *Id.* at 148. The *O'Leary* decision was subsequently affirmed by the Ninth Circuit. (9th Cir. 1980) (unpublished); J.A. 6. Since the original Administrative Law Judge decision, *O'Leary* has remained the seminal law concerning applicability of Section 933(g).[3]

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[3] See eg. *O'Leary*, 5 BRBS 161 (ALJ, 1976), 7 BRBS 144 (1977), *aff'd. mem.* 622 F.2d 596 (9th Cir. 1980)(unpublished); *Caranante v. International Terminal Operating Company, Inc.*,

The Fifth Circuit faced the issue four years after *O'Leary* in *Kahny v. Director, United States Dept. of Labor and Arrow Contractors of Jefferson, Inc.*, 15 B.R.B.S. 212, *aff'd mem.* 729 F.2d 757 (5th Cir. 1984)(unpublished); J.A.S. The Fifth Circuit held:

> "We find this analysis [*O'Leary*] fully consistent with the language, legislative history, and rationale of Section 933(g). The critical time for the determination whether one is a "person entitled to compensation" is the time of the challenged

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7 BRBS 248 (1977); *Wall v. Wall*, 15 BRBS 197 (ALJ, 1982); *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd. mem.* 729 F.2d 757 (5th Cir. 1984)(unpublished); *Todd v. J & M Welding Contractors*, 16 BRBS 434 (ALJ, 1984); *Wilson v. Triple A Machine Shop*, 17 BRBS 471 (ALJ, 1985); *Lindsay v. Bethlehem Steel Corporation*, 18 BRBS 20 (1986), 22 BRBS 206 (1989); *Dorsey v. Cooper Stevedoring Company, Inc.*, 18 BRBS 25 (1986); *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986); *Cernousek v. Braswell Shipyards, Inc.*, 19 BRBS 796 (ALJ, 1987); *Quinn v. Washington Metropolitan Area Transit Authority*, 20 BRBS 65 (1986); *Lewis v. Norfolk Shipbuilding and Dry Dock Corporation*, 20 BRBS 126 (1987); *Evans v. Horne Brothers, Inc.*, 20 BRBS 226 (1988); *Mobley v. Bethlehem Steel Corporation*, 20 BRBS 239 (1988), *aff'd.* 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990); *Blake v. Bethlehem Steel Corporation*, 21 BRBS 49 (1988); *Castorinav. Lykes Brothers Steamship Company, Inc.*, 21 BRBS 136 (1988); *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988); *Armand v. American Marine Corporation*, 21 BRBS 305 (1988); *Fisher v. Todd Shipyards Corporation*, 21 BRBS 323 (1988); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988); *Cunningham v. Kaiser Steel Corporation*, 21 BRBS 154 (ALJ, 1988); *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989); *Glenn v. Todd Pacific Shipyards Corp.*, 22 BRBS 254 (ALJ, 1989); *Sellman v. I.T.O. Corporation of Baltimore*, 24 BRBS 11 (1990); *Cretan v. Bethlehem Steel Corporation*, 24 BRBS 35 (1990); *Reaux v. H & H Welders & Fabricating*, 24 BRBS 7 (ALJ, 1990).

settlement. If, at that time, the employer is not making voluntary payments, and no award had been ordered by an ALJ, the claimant is not a "person entitled to compensation" under Section 933(g), and is not obliged to secure prior approval for a third party tort settlement."

J.A. 5, p. 108, 109.

The 1984 Amendment:

In 1984, Section 933(g) was again amended by Congress. The 1984 amendments redesignated pre-1984 Section 933(g), replete with the "persons entitled to compensation" language, as post-1984 Section 933(g)(1). The legislative history signifies no intent by Congress to overrule the interpretation of Section 933(g) adopted by *O'Leary* and its progeny. Congress is presumed to be aware of the administrative and judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 870 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

Applying the above rule of statutory construction, the administrative law judge in *Wilson v. Triple A Machine Ship*, 17 BRBS 471 (ALJ, 1985) noted:

> "the key words for purposes of the *O'Leary* decision, *supra*, and the others following it are "the person entitled to compensation." . . . The 1984 amendment did not change this language. On the contrary, [Section 9]33(g) begins: "If the person entitled to compensation." . . . Thus it can be inferred that where a claimant is not being paid voluntarily or under an award he is not "a person entitled to compensation" and [Section 9]33(g)(1) does not apply."

Id. at 477.

Clearly, as Congress did not remove the "person entitled to compensation" language from Section 933(g) when it reenacted that Section as Section 933(g)(1), and the legislative history does not indicate any intent by Congress to overrule the *O'Leary* line of jurisprudence, the *O'Leary* definition of "person entitled to compensation remains viable.

Given this, the only remaining issue before this Court, is whether the 1984 addition to Section 933(g), specifically, Section 933(g)(2), has any bearing on Petitioner's right to receive compensation. Section 933(g)(2) provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. 933(g)(2).

In construing this language, the Court is obliged to give effect, if possible, to every word Congress used. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955). In this regard it is noted that Section 933(g)(2) applies

"*regardless* of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this chapter." This language, strikingly similar to the *O'Leary* language defining "persons entitled to compensation", is noticeably absent from Section 933(g)(1). By adding this language to Section 933(g)(2), Congress clearly intended to preserve the distinction promulgated by the courts in *O'Leary* and its progeny between those claimants who are "persons entitled to compensation" and those claimants who are *not* "persons entitled to compensation".

O'Leary's continued viability is further buttressed by Congress' continued use of the language "persons entitled to compensation" in Section 933(g)(1) after 1984, as opposed to Congress' use of the language "employee" in Section 933(g)(2). This language evidences an intent that Section 933(g)(1) apply only to those claimants who are "persons entitled to compensation", as defined in *O'Leary*, and that Section 933(g)(2) apply to all claimants who are "employees", irrespective of whether said employees are also "persons entitled to compensation". It is respectfully submitted that this attempt to distinguish the two classes of claimants indicates a clear intendment to codify the *O'Leary* distinction. This distinction between the two classes is evident throughout the amended Section 933(g) as will be discussed infra.

Further examining the precise language of Section 933(g)(2), it is noted that, under Section 933(g)(2), a claimant's right to compensation benefits is forfeited: (1) if no written approval of the settlement is obtained and filed as required by paragraph 933(g)(1), *or* (2) if the employee fails to notify the employer of any

settlement obtained from or judgement rendered against a third person.

The first disjunctive portion above applies to those claimants who did not acquire the written approval required by Section 933(g)(1). Since under *O'Leary* the only claimants required to acquire written approval by Section 933(g)(1) are "persons entitled to compensation", this first disjunctive portion makes Section 933(g)(2) applicable to those "persons entitled to compensation" who did not comply with the written approval requirements of Section 933(g)(1). As Petitioner is not a "person entitled to compensation", this first portion of the disjunctive test does not serve to bring Petitioner within the purview of Section 933(g)(2).

However, the second portion of the disjunctive test does serve to bring Petitioner under the mandate of Section 933(g)(2). This test is not limited to those claimants who are required to obtain written approval under Section 933(g)(1), i.e. "persons entitled to compensation". Rather, this second portion applies to all claimants who are "employees", including, *but not limited to*, "persons entitled to compensation". As Petitioner was an "employee" of Nicklos, he was required to fulfill the requirements of this second portion of the Section 933(g)(2) disjunctive test.

Notably, the second portion of the disjunctive test requires the "employee" to *notify* the employer of any settlement, as distinguished from the requirement of *written approval* imposed on "persons entitled to compensation" by Section 933(g)(1), and the first disjunctive portion of Section 933(g)(2). Clearly, this wording indicates an intent to distinguish between the type of notice required by the various classes of claim-

ants. While Section 933(g)(1) claimants, i.e. "persons entitled to compensation", are required to obtain *written approval*, the broader class of Section 933(g)(2) claimants, i.e. "employees", are required only to *notify* the employer.

As the administrative law judge in *Wilson, supra* noted:

> "The distinction between approval and notice is highlighted by the fact that settlement and judgement are mentioned in the same phrase: "if the employee fails to notify the employee of any settlement obtained from or judgment rendered against a third person . . ." Notice of judgment makes sense; approval of judgment would not. In *Banks, supra*, the Supreme Court expressly held that a judge's action in reducing a jury's award adequately protected the employer's interest in the adequacy of the award—and that is the only interest the employer has in the third party action.
>
> *Wilson, supra* at 478.

Interpreting Section 933(g)(2) any other way would render a portion of the statute inoperative, a violation of the rules of statutory construction set out by this Court. See Eg. *Colautti v. Franklin*, 439 U.S. 379, 392 (1977), citing, *Menasche, supra* at 538-539. This is clear once it is realized that the Section 933(g)(1) claimants, i.e. "persons entitled to compensation", necessarily fall into the broader class of Section 933(g)(2) claimants, i.e. "employees". If Congress had intended the Fifth Circuit's interpretation of 933(g)(2), i.e. 'notify' = 'obtain written approval', than Section 933(g)(2) would effectively read: "If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to obtain written approval from the employer of any settlement obtained from or judgment rendered against a third person, . . ." Clearly, under the Fifth Circuit's interpretation, the second portion of the Section 933(g)(2) disjunctive test would have sufficed to cover the situation currently described in the first portion. By making Section 933(g)(2) disjunctive, Congress clearly intended to retain the distinction enunciated by *O'Leary*, and to further clarify *O'Leary* by proscribing the slighter burden required by claimants who were not "persons entitled to compensation" under Section 933(g)(1).

In *Robinson Terminal Warehouse Corporation v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971), the court held as a matter of law that where the employer of an injured longshoreman issued a draft in payment of an agreed third party tort settlement, the employer approved of the compromise for purposes of Section 933(g). In the captioned matter, Nicklos issued the payment of Cowart's settlement with Transco. Thus, Petitioner has met the notification requirement of Section 933(g)(2), the forfeiture language of Section 933(g)(2) was not triggered, and Petitioner's claim for compensation was left intact.

The Benefits Review Board's Interpretation After 1984:

Since the 1984 amendments, the Benefits Review Board has adopted the above enunciated interpretation of Section 933(g)(2).

In *Dorsey v. Cooper Stevedoring, Inc.*, 18 B.R.B.S 25 (1986) the Board addressed the effect of the ad-

dition of Section 933(g)(2) on claimants who were not receiving compensation benefits at the time of the third party settlement. The *Dorsey* Board held that this Section clearly applies regardless of whether the employer has made any compensation benefits to the claimant. *Dorsey*, *supra* at 29, 30. The Board continued:

> "It [Section 933(g)(2)] applies if no written approval is obtained pursuant to Section 933(g)(1) *or* if the employee fails to notify the employer of any settlement or judgment in a third party action."
>
> *Id.*

The Board in *Dorsey* concluded that where a claimant is *not* a "person entitled to compensation" he is required to *either* obtain written approval *or* notify the employer of the third party settlement. *Id.*

Similarly, in *Pinell v. Patterson Service*, 22 B.R.B.S. 61 (1989), the Board held that:

> ". . . under subsection 33(g)(1), just as under the 1972 version of Section 933(g), claimant is barred from receiving further compensation under the Act if he is a 'person entitled to compensation', i.e. employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. Under subsection 33(g)(2), regardless of whether employer has made payments or acknowledged entitlement, the employer must at a minimum be given notice of a settlement or compensation and medical benefits are barred; *written approval is not required.*"
>
> *Id.*

Because Petitioner was not a "person entitled to compensation" under any of these interpretations, Petitioner was required only to notify Nicklos of the settlement agreement; *written approval was not required.* As Nicklos funded the settlement agreement, the Section 933(g)(2) notification requirement was met. Thus, Petitioner's right to future compensation benefits was preserved.

The Director's Interpretation After 1984:

Petitioner recognizes that the Board's interpretation of Section 933(g)(2) is entitled to no special deference, since the Board does not "administer" the Act. Conversely, the Director, Office of Workers' Compensation Programs, who is charged with the administration of the Act, is entitled to such deference. *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046 & n. 23 (5th Cir. 1982) (en banc). Thus, unless the Director's interpretation is unreasonable or contrary to the purpose of the statute, the Director's interpretation of the Act should be accepted. *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116, 125-126 (1985).

In its brief submitted before the Fifth Circuit in the captioned matter, the Director noted:

> "The Director's general construction of Section 33(g), insofar as here relevant, accords precisely with the Board's decisions on point. Under the administrative construction, also adhered to by the Board, the written-approval requirement of Section 33(g)(1) was inapplicable to Cowart because of Nicklos Drilling's refusal, as of the time of the tort settlement, to acknowledge his right

> to any compensation beyond the time (over a year before the settlement) when he was released to return to work; and he satisfied Section 33(g)(2), which was applicable to his case, by complying with one of its two alternative requirements, that of giving notice to the employer."
>
> Director's brief, p. 13.

The Fifth Circuit's Interpretation After 1984:

In reversing the Board's affirmance of Petitioner's compensation award, the Fifth Circuit held:

> ". . . we hold that there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation. . .only if written approval of the settlement is obtained from the employer and the employer's carrier. . ."
>
> J.A. 2, p. 38.

While the Fifth Circuit's holding is correct in its verbiage, the Court failed to follow the express "unqualified" language which it cites. Section 933(g)(1) provides that written approval is required when the claimant is a "person entitled to compensation." Because Petitioner is *not* a "person entitled to compensation," the "unqualified" language of Section 933(g)(1) does *not* apply to Petitioner.

The Fifth Circuit continued:

> ". . . In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so."
>
> *Id.*

Petitioner respectfully submits that Congress has already enunciated its intent to limit the written approval requirement of Section 933(g)(1) by enacting Section 933(g)(2) in 1984. The interpretation and construction indicated by this enactment has been discussed in detail supra, and need not be reiterated here. Suffice it to say, that under the Supreme Court's rules of statutory interpretation and construction set out in *Colautti* and *Menasche*, the Fifth Circuit's broad-brushed interpretation of Section 933(g)(2) is insupportable.

In reaching its decision, the Fifth Circuit relied exclusively on their decision in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986). The language in *Collier* is indeed strong.

> "Section 933(g)(1) is brutally direct: "the employer shall be liable for compensation. . .only if written approval of the settlement is obtained from the employer and the employer's carrier."
>
> *Collier* at 647.

By adopting this language on its face, without taking into consideration the factual situation to which it pertained, the Fifth Circuit, circumvented the clear intent of the 1984 legislative amendments to the Act discussed supra. A brief review of the facts in *Collier*, bears this assertion out.

In *Collier*, claimant, David Collier, was injured while working as a helicopter pilot for PHI. *Collier* at 645. The injury occurred on the landing platform of a rig owned by Conoco. *Id.* Collier thereafter applied for and received benefits from PHI's carrier. *Id.* Collier subsequently sued Conoco in Federal District Court,

seeking $750,000.00 in damages. *Id.* Collier settled his claim against Conoco on April 17, 1979. *Id.* This settlement was confected without the approval of PHI or its carrier, and compensation benefits were *terminated for that reason* on April 17, 1979. *Id.*

As the foregoing summary shows, David Collier was receiving compensation benefits from his employer at the time he settled with Conoco. Evaluating this situation under the *O'Leary* criteria, Collier was clearly a "person entitled to compensation", and thus was clearly under the purview of Section 933(g)(1). Examined in this light, *Collier's* harsh wording is correct. As to "*persons entitled to compensation*", Section 933(g)(1) is "brutally direct." David Collier, as a "person entitled to compensation" *was* entitled to benefits *only* if written approval of the settlement was obtained from the employer and the employer's carrier.

By contrast, the Administrative Law Judge in the case at bar, determined that Petitioner was *not* receiving compensation benefits at the time of his settlement with Transco, and thus was *not* a "person entitled to compensation" under *O'Leary* and its progeny. Thus, Petitioner does not fall under the purview of Section 933(g)(1). Rather, Petitioner, as an "employee", but not a "person entitled to compensation", falls under the purview of Section 933(g)(2) and therefore need only *notify* the employer of his settlement with the third party. As Nicklos not only knew of the proposed settlement agreement, but actually paid it, Section 933(g)(2)'s notification requirement was clearly met, and Petitioner's right to compensation benefits was not forfeited.

The Ninth Circuit's Interpretation After 1984:

The Fifth Circuit's determination is clearly at odds with the Ninth Circuit's decisions in *O'Leary*, (discussed supra) and *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (9th Cir. 1990). While *Bethlehem Steel* concerned a claimant's right to medical benefits, the decision discussed the interpretation of Section 933(g)(2).

> "Section [9]33(g)(2)'s notification requirement thus serves two purposes. First, it enables an employer to protect its right to set off the amount of a settlement against any future obligations it might have. See 33 U.S.C. 933(f). Second, it ensures that an employer is able to protect its right to reimbursement from the proceeds of a third-party settlement in the amount of any payment the employer has already made. . . *So long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments, the purposes of the statute are satisfied.*
>
> *Id.* at 561.

The above emphasized language in the decision enunciates the same criteria upon which *O'Leary* and its progeny rely, indicating that *O'Leary* is still good law in the Ninth Circuit. Indeed, the Ninth Circuit held:

> "a claimant's notice to an employer of a third-party settlement before the employer has made any payments and before the Agency has announced any award is sufficient under section [9]33(g)(2).
>
> *Id.* at 562.

In the captioned matter, Nicklos, by paying the set-

tlement amount to Petitioner, certainly had notice of said settlement during the period that it was not paying Petitioner the compensation benefits he was due. It is clear that had Petitioner's claim arose in the Ninth Circuit, the court would have reached a different result.

CONCLUSION

The Longshore and Harbor Worker's Act is the source of compensation for thousands of injured workers in this country. Section 933(g) is the portion of that statute that deals with the rights of both employees and employers, in any case in which a third party may be liable. Until recently, Congress and the judiciary have struck an equitable balance between the interests of these two groups.

The Fifth Circuit in the captioned matter has destroyed the balance that has existed for so long. Their decision finds no support, in either the legislative history of the Act, or the strict linguistic interpretation of the words used. Nor does their decision find any support in the prior interpretations of this statute by the Judiciary. Conversely, the captioned decision constructively overrules over thirteen years of Administrative and judicial precedent.

The legislative history, and the general rules of statutory construction, mandate that Section 933(g) can only be interpreted as requiring *written* approval of third-party settlements confected by employees who *are* "persons entitled to compensation", and *notice* of third party settlements by employees who are *not* "persons entitled to compensation." To interpret Section 933(g) otherwise would result in incongruous results, not in accord with the liberal nature of the Act.

For the foregoing reasons, the Fifth Circuit's reversal of the case at bar should be vacated, and the Decision and Order of the Benefits Review Board should be affirmed.

Respectfully submitted,

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